

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT
COUNTY OF RICHLAND)	OFFICER FOR CONSTRUCTION
)	
)	
IN THE MATTER OF: PROTEST)	DECISION
TRULUCK ACTIVITY CENTER)	
STATE PROJECT H40-9502-CC)	POSTING DATE: November 21, 2000
CANNON ASSOCIATES, INC.)	
vs.)	
UNIVERSITY OF SOUTH CAROLINA)	
_____)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Cannon Associates, Inc. under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on the Truluck Activity Center Project (Project) for the University of South Carolina-Union (USC). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A decision is issued without a formal hearing after a thorough review of the bidding documents and the applicable law.

NATURE OF THE PROTEST

USC solicited construction bids for the Project. The Bid Form required the bidders to provide pricing for the Base Bid and four alternates. Five bids were received. Four of the bidders indicated that the costs for each of the alternates were additive to their respective Base Bid amounts. One bidder, Kingsmore Construction Company (Kingsmore) indicated that the costs for each of the four alternates were deductive to Kingsmore's Base Bid amount. The procurement official for USC contacted Kingsmore, who stated that its Base Bid included the costs of all four alternates, and that Kingsmore's deductive prices should be applied only if USC choose to not accept those alternates. Accordingly, USC posted a Notice of Intent to Award the Project to Kingsmore, accepting Alternates 1, 2 and 3, but not Alternate 4. The award price was established by USC by deducting Kingsmore's quoted price for Alternate 4 from Kingsmore's Base Bid. Cannon protests USC's decision to award the Project to Kingsmore.

FINDINGS OF FACT

1. On September 7, 2000 USC advertised the Project in *South Carolina Business Opportunities*.

2. On October 5, 2000 USC received and opened bids for the Project. Five bids were received as follows:

	Cannon Assoc.	Clayton Const.	Kingsmore	Morris Const.	Tyler Const.
Base Bid	\$423,400.00	\$444,000.00	\$470,270.00	\$452,000.00	\$458,000.00
Alt. 1	\$3,995.00	\$5,000.00	-\$4,467.80	\$6,130.00	\$3,830.00
Alt. 2	\$4,200.00	\$5,500.00	-\$8,875.00	\$5,700.00	\$2,884.00
Alt. 3	\$13,345.00	\$15,500.00	-\$8,770.00	\$16,500.00	\$8,652.00
Alt. 4	\$48,790.00	\$56,000.00	-\$57,170.00	\$52,600.00	\$52,600.00
Base + Alts.	\$493,730.00	\$526,000.00	\$390,987.20	\$532,930.00	\$525,966.00

3. On October 12, 2000 USC posted a Notice of Intent to Award the contract for the Project to Kingsmore. The Notice called for the acceptance of the Base Bid and Alternates 1, 2 and 3.
4. On October 18, 2000 Cannon protested the Notice of Intent to Award.
5. On October 24, 2000 Cannon submitted a second letter of protest, with amended grounds.

DISCUSSION

PROTESTANT'S POSITION

Cannon objects to the proposed award on the grounds that, first, the Notice of Intent did not use comparable figures for the evaluating the various bids. For Cannon (and the other bidders) USC combined the Base Bid amount and Additive Alternates 1, 2 and 3 and compared that figure with the combination of Kingsmore's Base Bid and the quoted price of Deductive Alternate 4. Cannon contends that the low bidder should be determined by a comparison of figures as they are written.

As a second ground of protest, Cannon objects that by allowing Kingsmore to state that their Base Bid included the alternates, USC permitted Kingsmore to qualify its bid impermissibly.

RESPONDENT'S POSITION

USC contends that the Base Bid provided by Kingsmore included all four alternates, as confirmed by a post-bid opening telephone call to Kingsmore. This contention was confirmed in writing by Kingsmore. This letter further stated that any alternate not chosen by USC should be deducted from the Base Bid amount.

CPOC FINDINGS

The statutes that govern the evaluation and acceptance of competitive sealed bids establish three cardinal principles, to wit:

1. Bids shall be accepted unconditionally without alteration or correction, except as otherwise authorized in the Code.¹
2. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition are allowed.²
3. As provided in the Invitation For Bids (IFB), discussions may be conducted with apparent responsive bidders for the purposes of clarification to assure full understanding of the requirements of the IFB. Clarification of any bidder's bid must be documented in writing by the procurement officer and included with the bid.³

The issues before the CPOC are first, the responsiveness and responsibility of Kingsmore's bid, and, second, whether USC's actions violated any of these principles in reaching its decision to post a Notice of Intent to Award.

The State's construction bid form is not a document requiring complex responses. Bidders are required only to identify themselves and certain subcontractors and to provide pricing for the items bid. Kingsmore did so and the CPOC finds Kingsmore's bid to be superficially responsive.

In reviewing the various bid amounts, the CPOC observes that Kingsmore's Base Bid amount, while the highest of the five, was not exceptionally so. Absent the minus sign, the magnitude of Kingsmore's quotations for the alternates was not unusual compared to the other bidders' responses. The scope of work for each of the alternates is clearly to require more effort from the contractor. Why would a bidder offer to charge less for providing more work? Taken on its face,

¹ See §11-35-3020(2)(b) of the Code.

² See §11-35-1520(7) of the Code.

³ See §11-35-1520(8) of the Code.

Kingsmore offered to perform the total project for \$390,987.20, about 25% below the average total bid of the other four bidders.

The process of competitive sealed bidding for construction requires bidders to examine and interpret the bidding documents, prepare independent cost estimates of the labor, material and equipment to be supplied and attach appropriate overhead and target profit amounts. Agencies also prepare cost estimates intended to predict the likely responses from bidders. Rightly or wrongly, a close correspondence between the agency's pre-bid estimate and the bidders' responses is considered to be evidence that there is a full and mutual understanding of the scope and quality requirements of the project. Conversely, any bid that is substantially below the agency's estimate should be considered potentially non-responsible, either for lack of understanding of the true scope of the project or an intent to provide less, or lesser quality, than is required by the bidding documents. In this case, USC's pre-bid construction estimate for the total project was approximately \$451,000. Kingsmore's apparent bid of some \$391,000 is over 13% below USC's estimate. The CPOC considers that any bid which deviates from the agency's estimate by more than 10% should be questioned as part of the agency's determination of the bidder's responsibility. Therefore, given the apparent disparity in bids, the CPOC finds that it was appropriate for USC to seek a clarification from Kingsmore.⁴ Such an effort must be severely restricted. Contacting a bidder to seek clarification or correction of substantive portions of its bid injects the potential for abuse into the procurement process. Once bids are opened and it becomes clear that a certain bidder is the winner but for an ambiguous provision in its bid, clarification would allow that bidder to manipulate its bid to ensure that it receives award of the contract.

USC sought clarification and Kingsmore responded with the interpretation described above. Kingsmore's response apparently satisfied USC that Kingsmore intended to provide the scope of work as defined in the bidding documents and therefore could be considered responsible. However, the nature of Kingsmore's response to USC's request for clarification reopened the issue of bid responsiveness. The CPOC emphasizes that Kingsmore's interpretation was provided, not on the Bid Form at the time of bidding, but after bids had been opened and read. As part of this administrative review, the CPOC requested that Kingsmore provide its bid preparation documents to verify the structure of their bid. Kingsmore declined to provide the requested documents.

⁴ The CPOC notes that the Panel has rightly placed strict limitations on post-bid contact with bidders, especially where price is concerned. See, for example, *In re: Protest of Two State Construction Co., Appeal by Two State Construction Co.*, Case 1996-2 and *In re: Protest of United Testing Systems, Inc.*, Case 1991-20, before the SC Procurement Review Panel.

Kingsmore's response did not change the prices bid for the alternates but it did change how those prices would be applied in the determination of the low bidder. The Instructions to Bidders provide explicit guidance on how the low bidder is determined when alternates are included in the bid. Article 5.3.2 of the Instructions to Bidders states:

5.3.2 The Agency shall have the right to accept Alternates in any order or combination, unless otherwise specifically provided in the Bidding Documents, and to determine the low Bidder on the basis of the sum of the Base Bid and Alternates accepted. [emphasis added]

The Instructions, which are equally applicable to the State and to bidders, are very clear—the low bidder is that bidder with the lowest combination price for Base Bid and accepted Alternates. Kingsmore claims its bid should be evaluated on the basis of Base Bid and non-accepted Alternates. Given that Kingsmore refused to provide the CPOC with any persuasive evidence that its bid as submitted was constructed as it now claims, the CPOC finds that Kingsmore's interpretation of its bid constitutes a change in bid prices prejudicial to the interest of the State and fair competition and cannot be accepted as responsive to the requirements of the solicitation.

DECISION

It is the decision of the Chief Procurement Officer for Construction that the bid of Kingsmore Construction Company, Inc. was non-responsive and that the University of South Carolina posted the Notice of Intent to Award in error. The University is hereby directed to rescind the Notice and to award the contract for the Truluck Activity Center Renovation Project to the lowest responsive and responsible bidder, consistent with the University's programmatic needs. The low bidder shall be determined in the manner set forth in Paragraph 5.3.2 of the Instructions to Bidders as contained in the Bidding Documents.

A handwritten signature in black ink, reading "Michael M. Thomas", is positioned above a horizontal line.

Michael M. Thomas
Chief Procurement Officer
for Construction

November 21, 2000
Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.